

Opening Pandora's Box: An Empirical Exploration of Judicial Settlement Ethics and Techniques

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I. INTRODUCTION

A. *Related Articles*

This article is the last of a series that explores judicial practices and attitudes during settlement conferences. Each of the articles in this series offers an analysis of data submitted by judges regarding the methods they employ during these conferences. Encouraging settlement is increasingly being recognized as an integral aspect of the work for many judges. This trend is championed as both a path to superior justice and as a means to judicial efficiency. However, it is also criticized as an inappropriate blurring of roles and a threat to the appearance of justice. Some critics have expressed concern that the need to manage dockets may cause judges to be coercive in encouraging settlements. One aspect of this concern is that the settlement

efforts of judges are largely conducted in chambers and without the presence of a court reporter; as such, there is rarely a record of exactly how a judge encouraged a particular settlement.

These conflicting viewpoints create an opportunity for additional analysis of the judge's role in settlement conferences. This article seeks to contribute to this discussion by presenting empirical data on judges' perceptions regarding their settlement practices. Empirical data from judges should enlighten the debate about concerns such as trial judges presiding over settlement discussions for cases assigned to them for trial. Since this is the last of a series of related articles, the following summaries will help put the data in this article in context.

The first of the articles in this series is entitled *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial*.¹ It documents that 82% of participating California judges believe that civil or family law judges should be allowed to conduct settlement conferences for cases assigned to them for trial, if the parties consent.² While judges overwhelmingly approved of the practice, judges with a general civil assignment were evenly polarized about actually doing it. Thirty-eight point one percent of general civil judges reported that they are the trial judge for over 90% of the settlement conferences they oversee.³ Thirty-nine point seven percent reported they are the trial judge for 10% or less of the settlement conferences they handle.⁴ This article includes an analysis of the ABA's Model Code for Judicial Conduct (2004) applicable to a judge's conducting a settlement conference for a case to which he will later be assigned for trial.⁵

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¹ Peter Robinson, *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335 (2006).

² *Id.* at 344.

³ *Id.* at 346.

⁴ *Id.*

⁵ *Id.* at 360-65.

The second article in this series is entitled *Settlement Conference Judge – Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*.⁶ This article focuses primarily on the judges' perceptions of how they influence settlement conferences.⁷ The questions in the survey were designed to enable researchers to assess the frequency of settlement judges using "directive" as compared to "facilitative" techniques and the frequency of settlement judges focusing on "legal merits" compared to "the parties' needs, goals, fears, and feelings."⁸ The approach taken by a judge is then considered against the percentage of settlements achieved, thereby giving some indication of the effectiveness of one approach over another.⁹ The data establishes that judges are surprisingly complex in their settlement strategies. About half the judges approximately conform to the prototype of an authoritative judge encouraging parties to bargain in the shadow.¹⁰ Roughly the opposite half of the judges report a preference for a facilitative settlement approach that focuses on creative solutions that address the parties' underlying needs.¹¹

Continuing in the series, the third article is entitled *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*.¹² This article focuses on four areas: the emphasis the settlement judge places on costs and risks, the techniques employed by the judge to encourage compromise, the techniques utilized to facilitate communication between all those involved, and finally, the effect of the judge's persona on the settlement conference.¹³

B. *Focus and Summary of this Article*

⁶ Peter Robinson, *Settlement Conference Judge – Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113, 127 (2009).

⁷ *Id.* at 121.

⁸ *Id.* at 125–127.

⁹ *See id.* at 123–124.

¹⁰ *Id.* at 126.

¹¹ *Id.* at 127.

¹² Peter Robinson, *An Empirical Documentation of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*, accepted for publication by the HARVARD NEGOT. L. REV. (forthcoming 2012) available at http://works.bepress.com/peter_robinson/2.

¹³ *Id.* at 7.

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This article focuses on the tension experienced by a judge between the requisite neutrality of his court with a desire for fairness when the judge is facilitating a settlement. The survey inquired as to several methods judges employ to resolve this conflict: by recusal, through the education of the parties, and by methods employed to ensure procedural fairness.

When a judge suspects that the settlement emerging in his chambers may be unfair, he may choose to recuse himself instead of contributing to an outcome that he finds uncomely. This recusal may be offered with or without explanation. As recusal is an extreme judicial decision, as anticipated, the judges displayed a marked aversion to recusal—either with or without explanation.

The judge may also choose to share with the parties his own perception of what a fair settlement range should be, based on the judge's experience with outcomes at trial in similar cases. This advice may constitute sharing with the parties the normal range of jury verdicts in similar cases, or relating to the parties his own assessment of how fair the settlement is. A significant number of judges reported that they share their opinions on the normal range of jury verdicts. All judges reported an adamant avoidance of providing their own assessment of the fairness of a particular settlement.

In the instances when a judge does impart his own opinion of the settlement, two questions dealt with his reaction when he is thereafter met with resistance (presumably from the party who was receiving the benefit of the unfair settlement). Judges overwhelmingly rejected the option to recuse themselves when met with resistance and, of those judges who reported a willingness to educate, most responded that they "do nothing" when met with resistance.

The judge may also undertake certain steps to ensure procedural fairness. The procedural fairness questions dealt with the judge's inquiry as to the parties' knowing waiver of their legal rights, whether the parties were experiencing fraud, undue influence, or duress, and whether the judge explicitly defined his role as solely one of assistance in obtaining a settlement. When parties are represented, judges exhibited far more discretion in inquiring as to whether the parties are making a knowing waiver of their legal rights. When the parties are unrepresented by an attorney, the majority of judges reported delving into this issue in more than 90% of their settlement conferences. When considering fraud, undue influence, or duress, the judges embrace the practice of asking questions in order to ensure that the parties were contracting of their own volition.

Next, the survey asked judges how often they disclose to the parties that they are merely present to facilitate a settlement; meaning that they are

neither offering approval nor disapproval by assisting in the settlement, but simply facilitating a process. One criticism of settlement conferences is that the parties will consider the judge's participation in the settlement process as tacit approval of the resulting settlement. These questions determined how often the judge will choose to divulge the extent of his role to the parties, to clarify any misconceptions held by the parties. While only a small number of judges reported that they do not clarify their role, the data is still significant because of the possible negative ramifications that may result from the naïveté of unsophisticated, unrepresented parties.

Part III of the article considers issues that arise when the judge supervising the settlement conference is also the judge assigned to the case for trial. Questions were posed regarding the judge's docket, how the culture in which the judge operates affects his ability to recuse or avoid being the trial judge, and how the sheer volume of cases before the judge might affect the process.

When the judge knows that he will serve as both overseer of the settlement conference and the trial judge, the question arises whether he modifies his settlement approach accordingly. Judges responded that, when armed with this foreknowledge, they did adjust their approaches. Although this question requested judges to "fill in the blank" as to how they adapted their style, the firm majority responded that they "are less expressive of personal opinion" when they know that they will be the trial judge.

Finally, the article addresses potential concerns that arise when there is a combination of the settlement and adjudicatory roles. The primary point of contention that arises in this situation regards the parties' perceptions of neutrality when the case does not settle, but proceeds through the judicial process. Interestingly, high-settling judges responded that they held less regard for party perceptions regarding neutrality. Another concern is the impact on the quality of the subsequent substantive rulings in the trial—that their later decisions are impacted by the information they gained while serving at the settlement conference. This point of apprehension is particularly poignant when the judge gains information that is confidential, or that would be inadmissible under the rules of evidence in a trial. Additionally, the judge may feel the desire to rule a certain way at trial in order to validate his earlier assessment of the case at the settlement conference. There exists the distinct possibility that, even unconsciously, the ego of a judicial officer might push him ever so slightly toward a ruling in keeping with his prediction. And although impartiality is the benchmark of a judge, by combining the settlement and adjudicatory roles, the risk of resentment toward an unreasonable party exists. If a judge feels that one

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party put less than a good faith effort into settling, that judge may bear hostile feelings toward the party for adding to the burden of his already trundling docket. These are all potential issues that arise when the role of a judge blurs between a strictly impartial arbiter of justice and a self-serving mediator.

Questions were also posed as to the means trial judges employ to encourage settlement, be it expediting a ruling on a motion, delaying a ruling on a motion, scheduling additional settlement conferences, or engaging in other measures. Judges admit to expediting, but are loath to acknowledge delay. Just as the schoolmarm employs additional after-school detentions, so too will judges schedule additional settlement conferences to convince a stubborn party that conclusion without a trial is in the party's best interest.

Ultimately, by presenting empirical data on judges' perceptions regarding their influence on settlement, this series of articles seeks to contribute to the discussion of whether settlement conferences can provide superior justice, increase judicial efficiency, or both. This article intends to be useful to those interested in this debate by documenting a comparatively rare perspective on how judges encourage settlement. The debate over the appropriateness of this role should be enriched by information on the judges' perspective of what they do when they are in this role.

This article also intends to be useful to practicing judges. Judges have commented on the insularity of the job and the benefit of documenting judicial norms regarding settlement practices. The presentation of the data is structured in such a way that sitting judges can compare their technique with the practices of judges with similar assignments. Some of the accepted settlement techniques among family judges may not be shared by judges with a general civil assignment. Limited jurisdiction and complex civil judges would benefit from access to data from judges with the same assignment. The pressure and intricacies of these assignments are so diverse that the questionnaire about settlement technique sought to report the results for various groups of judges.

The purpose of the project was to confirm or refute a common expectation that settlement judges focus on the law and are very directive. The surprising results suggest that settlement judge behavior is much more complicated and situational. The complex and variable nature of judicial approaches to settlement work should not be surprising given the diversity of personalities, interests, and views of the wide range of people serving as judges.

C. Methodology for Surveying California Judges

California's Administrative Office of the Courts ("AOC") allowed the author to survey the approximately 1,800 Californian trial and subordinate judicial officers¹⁴ regarding judges' attempts to settle civil or family law cases. The data developed from this survey is suspect in that the judges were self-reporting and thus prone to view and interpret themselves in the best possible light.¹⁵ The AOC¹⁶ participated in developing the survey,¹⁷ which asks judges about their views regarding their assistance in the settlement of cases and their practices from 2000-2004.¹⁸

The surveys were mailed out in an AOC envelope with other AOC correspondence.¹⁹ The responses were returned to a Post Office Box in Winnetka, Calif., a little-known community in the San Fernando Valley, as part of a comprehensive commitment that participants should not know that a professor from the Straus Institute at Pepperdine University in Malibu, California was the AOC's collaborator for this project.²⁰

¹⁴ This includes all elected and appointed trial judges and commissioners.

¹⁵ "[P]eople's assessments of their own abilities to meet various challenges exceed the best dispassionate analyses of those abilities [P]eople's assessments of their own traits and abilities have been shown, time and time again, to be overly optimistic." Thomas Gilovich et al., *Shallow Thoughts About the Self: The Automatic Components of Self-Assessment*, in *THE SELF IN SOCIAL JUDGMENT* 67, 67 (Mark D. Alicke et al. eds., 2005).

¹⁶ Special appreciation is expressed to AOC staff attorneys Karene Alvarado, Heather Anderson, and Alan Wiener, and Judge E. Jeffrey Burke.

¹⁷ Survey on file with author.

¹⁸ The instructions stated that participation was completely voluntary and that respondents were free to not answer any question for any reason. The judges were told that participation would assist in documenting judicial norms and they could receive a composite summary of the responses by returning a separate postage paid postcard, even if they chose to not complete the survey.

¹⁹ The judges were informed of the AOC's partnership with a law school professor on this research project to ensure the anonymity of their responses. The judges knew that even the law school professor would not know which judges responded and only the aggregate compilations of the data would be provided to the AOC.

²⁰ The concern was that the responses from the approximately 200 judges who had completed the Straus training program might be positively biased because they appeared to appreciate the training and like the faculty. In light of this concern, neither Pepperdine nor Malibu were identified in any of the correspondence which contained the cover letter, return address envelope, post card, and the questionnaire itself. The last question, which

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For this study, 368 out of approximately 1,800 surveyed bench officers responded. Although a little disappointing, the low response rate was not completely surprising because the survey was extensive, requiring about fifteen minutes to complete, and judges are notorious for not completing surveys. One weakness of the following analysis and conclusions is that they are based on a limited response. The 368 who responded stated that between 2000-2004 they had the most experience in conducting settlement conferences in the following areas:

- General Civil ²¹	129 respondents
- Family Law ²²	72 respondents
- Limited Jurisdiction Civil ²³	22 respondents
- Complex Civil ²⁴	6 respondents

lists various training programs including JAMS, AAA, community mediation organizations, and Pepperdine, was the only exception.

²¹ The California Rules of Court define “General Civil Case” as “all civil cases except probate, guardianship, conservatorship, family law (including proceedings under the Family Law Act, Uniform Parentage Act, and Uniform Child Custody Jurisdiction Act; freedom from parental custody and control proceedings; and adoption proceedings), juvenile court proceedings, small claims proceedings, unlawful detainer proceedings, and ‘other civil petitions’ as defined by the Judicial Branch Statistical Information Data Collection Standards.” CAL. CT. R. 200.1.

²² Family law embodies all matters like divorce, child custody, child support, and domestic violence. SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE, *Family Law: General Information* (2011), <http://www.occourts.org/self-help/familylaw/index.html>.; Black’s Law Dictionary defines family law as “[t]he body of law dealing with marriage, divorce, adoption, child custody and support, child abuse and neglect, paternity, juvenile delinquency, and other domestic-relations issues.” BLACK’S LAW DICTIONARY 638 (8th ed. 2006).

²³ In this context, “limited jurisdiction” means that a court has pecuniary restrictions on the cases it can decide. See BLACK’S LAW DICTIONARY 869 (8th ed. 2006). E.g., small claims is a court of *limited jurisdiction*, because it can only hear cases that claim damages of \$5,000 or less. In 2004, California’s Limited Jurisdiction Courts handled cases that claimed damages up to \$25,000. CAL. CIV. PROC. CODE § 85(a) (West 2006).

²⁴ “Complex civil cases are cases that require exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants,” and “may involve such areas as antitrust, securities claims, construction defects, toxic torts, mass torts, and class actions.” CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, *Complex Civil Litigation Fact Sheet 1* (2008), available at <http://www.courts.ca.gov/documents/comlit.pdf>.

- Marked more than one of the above 10 respondents
- Did not conduct settlement conferences
in any of the above types of cases in the
last four years 85 respondents
- Did not respond to this question 44 respondents

The assumption is that the eighty-five respondents who had not conducted settlement conferences in any of the above categories had criminal law assignments.

Determining the judicial assignments for the various judges is important because the customs and techniques may vary from one assignment to another. The nature of the dispute may explain why certain techniques are favored by judges with a designated assignment. The caseload volume will also vary by assignment. The survey determined that the average number of new cases assigned per year was 441 for general civil, 1,317 for family law, 1,287 for limited jurisdiction civil, and 235 for complex civil. The docket pressures and workflow for a complex civil judge with 235 new cases each year will be dramatically different than a family law judge with 1,317 new cases each year. Clearly, the settlement conference technique and practices need to be analyzed for each type of judicial assignment.

C. Template for Presenting Data

This paper will present one of the survey's questions, an explanation of its significance, the judges' responses to that question, and then the author's analysis and conclusions. One of the early questions presented in the survey asks judges to fill in the following blank: "The percentage of cases that settle at my settlement meetings is about ____."

This data identifies which judges report high and low settlement rates; this is important because the responses from the other questions can be presented to isolate the more and less effective techniques according to their reported settlement rate.

The responses for this question reveal the following percentages of judges reporting the corresponding frequency of accomplishing settlement at settlement conferences²⁵:

²⁵ Many of the columns add up to more than 100% because throughout the study, the investigators rounded up for results that were 0.5 or higher and rounded down for

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	All Judges	General Civil	Family	Limited Jurisdiction	Complex Civil
<25%	5	7	9	15	0
25-49%	14	12	14	10	0
50%	19	19	20	38	17
51-74%	18	22	10	10	17
75% (+)	49	42	52	30	66

The data reveals that for all judges, 49% report accomplishing a settlement in 75% or more of their settlement conferences and that 38% report accomplishing a settlement in 50% or less of their settlement conferences. This data can isolate the responses for different judicial assignments. Thus, the third column establishes that 42% of general civil judges report accomplishing a settlement in 75% or more of their settlement conferences and 38% report accomplishing a settlement in 50% or less of their settlement conferences. The results for general civil judges can be compared to family judges in the fourth column where 52% report accomplishing a settlement in more than 75% of their cases and 43% report accomplishing a settlement in 50% or less of their settlement conferences. Columns five and six provide the data for limited jurisdiction and complex civil judges.

Although this data alone is interesting, it also allows the organization of other data into sub-categories for high- and low-settling judges.²⁶ Thus, some distinctions in the data will be reported in graphs using the following

results that were less than 0.5. This raw data for many of these columns had results with higher than 0.5, creating an outcome greater than 100%.

²⁶ The usage of high- and low-settling judges carries two connotations that should be addressed. First, the phrases suggest that judges settle or fail to settle cases; it must be remembered that settlement is up to the parties and that the judge merely facilitates the parties' decision. Second, the phrases suggest that settlement is better than not settling; there are many scenarios where observers would agree that not settling is better than settling. The phrases are only utilized to facilitate the presentation of the data.

columns across the top to indicate the groupings of judges whose results are being reported.

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
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The first column reflects the percentages for the 129 general civil judges who completed the survey.²⁷ The second and third columns are subsets of the first column. The second column isolates the survey results for judges settling 75% or more of their cases. Similarly, the third column isolates the survey results for judges reporting that they settle 50% or less of their cases. General civil judges intent on increasing their settlement rates should be interested in comparing the second and third columns.

The fourth column reports the results for the seventy-two family law judges who completed the survey. The fifth and six columns are subsets of the fourth column and reflect the survey results for the family law judges who report settling 75% or more of their cases (column five) and 50% or less of their cases (column six). Column seven reports the results for the twenty-two limited jurisdiction civil judges; subset analysis was not conducted because of the small number of limited jurisdiction judges completing the survey. The last column reports the results for the six complex civil judges who completed the survey; although the small number of complex judge responses raises statistical analysis issues, the results are reported because there are less than twenty such judges in California.

II. SETTLEMENT JUDGES' TENSION BETWEEN NEUTRALITY AND FAIRNESS

This area of investigation probes an important issue of how settlement judges resolve the tension between maintaining neutrality and promoting fairness. This issue is a "no-win" dilemma because if the settlement judge promotes fairness, he will necessarily compromise neutrality. When the judge intervenes out of concern for fairness, his act favors the party who was going to be exploited—at the expense of the party who was going to benefit from the unfairness. Likewise, judges who choose to protect their neutrality

²⁷ Note that not every participating judge responded to every question. Thus, the percentages for a given question reflect responses for the judges that answered the particular question.

will compromise fairness. Deciding not to intervene out of a commitment to neutrality necessarily suppresses the judges' concern about some unfairness. There is an inherent tension between the two positive values in a judicial settlement process.

This question goes to the heart of a judge's judicial philosophy. If he is presiding over a jury trial and one of the attorneys is incompetent, will he intervene to question a witness or will he refrain? If he questions the witness, he is valuing fairness over neutrality. If he refrains, he is valuing neutrality over fairness. Judges do not agree on how to best handle this perplexing dilemma at trial, let alone at a settlement conference.²⁸ This investigation seeks to document judicial norms on the topic in the judicial settlement function.

A. How Judges Resolve this Dilemma

How judges resolve this issue could be a distinguishing characteristic between private-sector mediators and public judges. Some private-sector mediators have a reputation for doing almost anything to settle a case. The data from this question should offer insight into whether public judges exercise a higher scrutiny regarding the quality of the resulting agreement. While they experience the same dilemma as private-sector mediators, their status as judges may impact how they balance this tension. Compared to private-sector mediators, the importance of both virtues is accentuated for judges. Judges may sense a greater commitment to err on the side of fairness because they represent the public justice system.²⁹ The public must perceive

²⁸ Peter Robinson, *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335, 341–42 (2006):

In addition to legal academic debate, this issue is a source of controversy among the sitting bench. The debate surfaced anecdotally, and regularly, when this author led more than eight groups of about twenty-five California judges, each in mediation skills training programs over five years... The data might assist academics and policy makers wrestling with an array of questions related to judges attempting to settle cases assigned to them for trial. It might also be of interest to those judges, who at times feel isolated and are curious about judicial norms.

²⁹ *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1136 (1999). Judge Brazil states, “[i]t is the fundamental duty of a public court in our society to do justice—to resolve disputes in accordance with the law when the parties don’t. Confidence in our system of justice as a whole, in our government as a whole, turns in no small measure on

that court-annexed settlement processes are fair or they wouldn't be used.³⁰ The questions used to investigate this area are:

18. When I conduct settlement discussions in a civil or family law case and believe that the emerging settlement substantially deviates from what I believe would be the normal range of outcomes at trial, I use the following responses with the designated frequency:

Recusal:

18I. I recuse myself as settlement judge without explanation;

18H. I recuse myself as the settlement judge explaining that in my opinion the negotiations were producing an unbalanced outcome;

Educate the Parties:

18E. I make statements acknowledging my limited information about the case, but inform the parties of my general perspective of the parties' legal rights and of the normal range of jury verdicts for cases like theirs;

18A. I refrain from saying anything that implies my personal view of the settlement terms;

18G. I inform the parties of the normal range of jury verdicts for cases like theirs, but if I meet serious resistance, recuse myself as settlement judge;

18F. I inform the parties of the normal range of jury verdicts for cases like theirs, but if I meet serious resistance, do nothing;

Procedural Fairness:

18D. I ask questions to ascertain if the parties are aware of their legal rights, but are knowingly and purposefully choosing to not exercise those rights;

18C. I ask questions to ascertain if the parties are entering the agreement freely and willingly and that there is no fraud, undue influence, or duress;

18B. I make sure that participants understand that my role in this meeting is to assist in reaching a solution agreeable to the parties, even if it is substantially different from what I believe would be within the normal range of trial outcomes.

confidence in the courts' ability to do justice in individual cases. So doing justice in individual cases is an interest of considerable magnitude." *Id.*

³⁰ CAL. CT. R 3.850(a) ("The rules in this article establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts. For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.").

The questions measure the frequency with which settlement judges utilize nine different possible responses. Each question is accompanied by two sub-questions, which also ask the judges the frequency of situations in which the parties are represented and the frequency when the party(ies) getting the bad deal are *not* represented. The focus for unrepresented party(ies) was on the party getting the bad deal because that situation is more likely the one in which the unrepresented party is not making an informed decision. The cumulative data from this question should contribute to the debate about how settlement judges resolve the tension between neutrality and fairness.

1. *Judges Resolving this Tension by Recusal*

This section explores how often settlement judges protect their neutrality and still stand for fairness by recusal. Recusal supports a judge's commitment to fairness by refusing to allow the judge's office or process to be used for an outcome the judge perceives as unfair.³¹ Recusal without an explanation also maintains the judge's neutrality because he has not used his position to the advantage of either party. Recusal is an extreme judicial response because judicial ethics require that judges hear cases except in instances of bias, impropriety, or their having made public comments about the case now before them.³² Judicial settlement conferences are optional and could be viewed as an extraordinary service provided by the court. A judge could usually recuse himself as the settlement judge and still hear the case, as evidenced by judges who never conduct settlement conferences for cases assigned to them for trial.³³

The first question for analysis in this section investigates the frequency with which judges use recusal without an explanation when they believe the emerging result is unfair.

³¹ For the purpose of this questionnaire and article, unfairness is defined as an outcome that substantially deviates from the range of normal trial outcomes.

³² Robinson, *supra* note 1, at 360–365.

³³ See *infra* Section III.A.1 at 39 (“A danger of having the trial judge also serve as the settlement judge is that she has too many incentives to settle the case.”). See also *infra* Section III.A.2 at 41 (“The advantage of referring the settlement conference to a non-trial judge is that the settlement judge does not have an unhealthy incentive to push settlement. The weakness of such a system is that the trial judges’ ‘docket inventory’ is dependent on other judges’ settlement abilities.”).

i. Recusal Without Explanation (18I)

The first number in each box is the judges' response assuming the parties are represented by counsel at the settlement conference. The second number in each box is the judges' response assuming the parties are not represented.

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10%	99, 98	97, 97	100, 100	100, 100	100, 100	100, 100	100, 100	100, 100
10- 40%	1, 1	3, 3	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0
41- 60%	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0
61- 90%	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0
>90%	0, 1	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0

This question received the most unanimity of any in the survey. Judges do not recuse themselves without an explanation when they believe the emerging result is unfair. The judges' overwhelming rejection of this option is surprising because it offers them a solution that honors both virtues of neutrality and fairness.

However, the question's compound nature means that judges may have uniformly rejected this option because they do not recuse themselves or because they may offer an explanation. To test which of these factors was dominant, the next question investigates how often judges recuse themselves while "explaining that in their opinion the negotiations were producing an unbalanced outcome."

ii. Recusal Explaining that the Emerging Outcome was Unbalanced (18H)

This question preserves the judge's concern for fairness through recusal, but partially compromises neutrality by signaling that one of the parties is getting an unfair result. That signal might trigger further investigation or

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preparation by the party getting a bad deal or result in that party acquiring representation to assist in the negotiations.

The judges' responses (Represented on the left and Not Represented on the right in each box) are:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10%	99, 96	100, 97	97, 97	96, 96	100, 100	87, 90	94, 100	100, 100
10-40%	0, 2	0, 3	0, 0	2, 2	0, 0	7, 5	6, 0	0, 0
41-60%	1, 0	0, 0	3, 0	2, 2	0, 0	7, 5	0, 0	0, 0
61-90%	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0	0, 0
>90%	0, 2	0, 0	0, 3	0, 0	0, 0	0, 0	0, 0	0, 0

Again the judges overwhelmingly rejected this option. Three percent of low-settling general civil judges reported doing this in more than 90% of their unrepresented cases and a few low-settling family judges reported doing this about half the time. While very few judges reported using this approach with much frequency, it is interesting that those who did were all low-settling judges. One interpretation is that high-settling judges have thicker skins. In any event, the big picture is that judges disfavor recusal when they see the emerging settlement substantially deviating from what they believe would be the range of normal trial outcomes.

This determination to proceed with an unfair settlement is especially interesting in family law. In family law, the judge is the one who delivers the normal range of trial outcomes. It is even more interesting that this laissez-faire approach is prevalent when parties are unrepresented. Many might have expected more concern for fairness when there is an unrepresented party in a family law matter, which is not uncommon for lower income parties in California. The laissez-faire approach is justifiable because of the judges' duty to neutrality, but the general public may have a perception that a judge would intervene or stop the settlement conference if it is producing an unfair result.

The data so far suggests that judges do not stop the settlement conference. The survey also explored their willingness to educate the parties.

2. Judges' Willingness to Educate the Parties

Since the judges proceed with a settlement conference producing an unfair result, data regarding *how* they proceed might give insight as to whether they favor fairness or neutrality. One area of investigation is whether the judges are willing to educate the parties. Judges have specialized expertise on likely outcomes at trial. Sharing that expertise would educate the parties on the judges' perspective, helping the parties to make an informed choice about the benefits and weaknesses of accepting a proposed settlement. When the settlement judge believes that the emerging settlement substantially deviates from his view of the normal range of outcomes at trial, he may be especially inclined to share his perspective. Doing so may create issues regarding his neutrality because his perspective will favor one party over another. This solution clearly would indicate that judges favor fairness in this situation.

i. Judges Inform Parties of Normal Range of Jury Verdicts in Similar Cases (18E)

The exact survey question asked was: "How often do I make statements acknowledging my limited information about the case, but inform the parties of my general perspective of the parties' legal rights and of the normal range of jury verdicts for cases like theirs."

The judges' responses (Represented on the left and Not Represented on the right in each box) are:

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	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10%	34, 32	49, 40	21, 31	43, 33	53, 31	38, 41	53, 31	33, 50
10-40%	13, 16	5, 10	28, 25	12, 13	11, 8	6, 14	6, 19	17, 25
41-60%	22, 20	16, 24	24, 13	14, 17	16, 23	13, 9	6, 6	0, 0
61-90%	12, 11	14, 5	7, 16	14, 11	16, 8	13, 9	29, 31	33, 25
>90%	20, 21	16, 21	21, 16	17, 26	5, 31	31, 27	6, 13	17, 0

The data suggests that a significant number of judges use this technique within each category of frequency. There is a bias towards not using it, with about 20% of general civil and family judges using it more than 90% of the time compared to about 33% using it less than 10% of the time. High-settling judges use it less than low-settling judges, with about half using it in less than 10% of their represented cases. There was not much difference between the frequency for represented and unrepresented parties for general civil judges. In contrast, high-settling family judges used this technique more frequently with unrepresented parties.

The prior questions suggested that judges tend to persevere through settlement conferences that have emerging unbalanced outcomes. This question establishes that judges are divided about sharing their perspective on parties' rights and likely trial outcomes. The preference for a laissez-faire approach continues since more judges choose to not educate the parties.

This area of investigation can be further explored by asking judges the frequency with which, under these circumstances, they "refrain from saying anything that implies [their] personal view of the settlement terms."

ii. *Judges Refrain from Sharing Their Personal View of the Settlement (18A)*

Prior questions established that recusal is rare, and judges have a mixed reaction to educating the parties. This question approaches the issue of educating parties by measuring restraint. The results should be somewhat of

a mirror image of the immediately preceding question, which measured judges' willingness to share their perspectives of legal rights and trial outcomes.

The judges' responses (Represented on the left and Not Represented on the right in each box) are:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10%	13, 13	8, 18	3, 7	20, 21	17, 27	28, 15	18, 6	0, 0
10-40%	4, 17	3, 16	7, 16	10, 20	17, 20	6, 19	12, 13	0, 0
41-60%	11, 13	11, 16	14, 10	10, 12	13, 13	11, 15	18, 13	0, 0
61-90%	15, 12	19, 11	7, 16	24, 17	17, 17	17, 15	18, 19	33, 50
>90%	57, 45	51, 40	69, 52	37, 30	35, 23	39, 35	35, 50	67, 50

All judges report a high frequency of this practice, which confirms a laissez-faire, "buyer beware" approach. About half of general civil judges report using this more than 90% of the time compared to about one-third of family judges. High-settling general civil judges use it less than low-settlers, which means that high-settling judges are more willing to educate the parties. General civil judges use it less with unrepresented parties, suggesting a greater willingness to educate unrepresented parties.

This data is largely consistent with the data from the prior question and supports the following conclusion. Approximately one-third of judges appear to educate parties more than 60% of the time: those marking more than 61% on the question regarding informing the parties and marking 40% or less frequency in refraining from sharing personal views. The flip side of this data is that two-thirds of judges report a preference for neutrality over fairness in settlement conferences. Settlement judges are a little more willing to educate when they are working with unrepresented parties, but the ratios only shift to 50:50.

Before leaving this topic, it would be interesting to explore the responses of judges who start to educate the parties, but then meet serious resistance.

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The unstated source of the resistance is the party who would be damaged by the judge's opinion on the merits. The anticipated scenario is that the party who is accomplishing an advantageous outcome objects when the settlement judge starts to use his expertise to balance the playing field. Realize that only one-third (for represented parties) and one-half (for unrepresented parties) of judges are willing to educate the parties. Exploring the behavior of these judges, when the advantaged party objects, serves to measure the depth of their conviction. The two choices offered were "recusal" or "do nothing."

iii. *Judges Meet Resistance and then Recuse (18G)*

The question is problematic because it contains two elements: first, that the judge is willing to educate the disadvantaged party and, second, that the judge recuses himself when he meets serious resistance. The exact survey question asked how often the judge in this situation "informs the parties of the normal range of jury verdicts for cases like theirs, but if [they] meet serious resistance, recuse [themselves] as settlement judge."

The judges' responses (Represented on the left and Not Represented on the right in each box) are:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10%	96, 95	97, 97	93, 94	97, 95	100, 96	100, 100	88, 100	100, 100
10- 40%	3, 1	3, 0	7, 3	0, 2	0, 4	0, 0	6, 0	0, 0
41- 60%	0, 1	0, 3	0, 0	3, 2	0, 0	0, 0	0, 0	0, 0
61- 90%	0, 1	0, 0	0, 3	0, 0	0, 0	0, 0	0, 0	0, 0
>90%	1, 2	0, 0	0, 0	0, 0	0, 0	0, 0	6, 0	0, 0

Although we are not sure how the judges interpreted the question, they again overwhelmingly rejected the recusal option. The interpretation of this compound question is enabled by building on the benchmark data from the other questions, which showed that approximately one-third (for represented

parties) and one-half (for unrepresented parties) of judges are even willing to educate the parties. For those judges, this offered the possibility of a sense of balance between fairness and neutrality in the face of serious resistance by recusal. Recusal honors neutrality by ceasing the education that will favor one party over the other. Recusal honors fairness by declaring, "I will not facilitate an unfair settlement." The judges overwhelmingly reject the recusal option.

There are a variety of options, but the one that is most feared, and thus investigated, is that the judge who meets serious resistance while working for fairness in the settlement, proceeds with the settlement conference, but is convinced to abandon the education effort.

iv. Judges Meet Resistance and Do Nothing (18F)

The survey question asks judges if, under the circumstances in which they believe that the emerging settlement substantially deviates from their opinion of the normal range of outcomes at trial, how often they will "inform the parties of the normal range of jury verdicts for cases like theirs, but if [they] meet serious resistance, do nothing." This question is problematic because it is vague, in addition to being compound. "Doing nothing" could mean that the judge ends the settlement conference. This option is not likely because this is very similar to recusal, which the judges rejected. Alternatively, "doing nothing" could mean that the judge ignores the resistance and proceeds to educate (not allowing the resistance to affect him). Finally, "doing nothing" could mean that he proceeds with the settlement conference but does nothing about the emerging unfairness.

The judges' responses (Represented on the left and Not Represented on the right in each box) are:

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	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10%	47, 44	61, 49	32, 42	58, 63	63, 57	69, 82	50, 44	40, 67
10- 40%	8, 11	6, 5	18, 19	9, 9	6, 9	0, 6	6, 25	20, 33
41- 60%	16, 19	8, 24	25, 16	15, 9	6, 9	23, 6	13, 13	20, 0
61- 90%	13, 13	8, 11	11, 10	15, 12	25, 13	8, 6	19, 6	20, 0
>90%	16, 14	17, 11	14, 13	3, 7	0, 13	0, 0	13, 13	0, 0

While the format of the question is problematic, the data is potentially helpful. While other interpretations are possible, the following discussion should be considered. As with the prior question about recusal, this data should be interpreted in light of the benchmarks showing that about one-third (for represented parties) and one-half (for unrepresented parties) were willing to educate the parties. Those benchmarks compare to this data of about two-thirds of judges rejecting this response more than 60% of the time for both represented and unrepresented parties.

The benchmark identified that two-thirds of judges usually rejected the potential educational role for represented parties anyway, so the reported two-thirds rejecting this technique were the ones who weren't interested in the educational role. If the one-third of the judges who were willing to educate were proceeding with their educational role, in spite of encountering serious resistance, the number of judges rejecting this technique should have been much higher than the benchmark. That 30% of general civil and 20% of family judges reported that they do this at least 61% percent of the time suggests that most of the judges who are willing to educate "do nothing" when they encounter serious resistance. Since only one-third (represented parties) and one-half (unrepresented parties) of the judges are even willing to educate, most of those judges willing to educate defer to the advantaged parties' wishes if those parties offer serious resistance.

While the interpretation is not certain, the above data could be read to suggest a disturbing conclusion: That settlement judges who are inclined to balance the playing field by educating a disadvantaged party regarding legal

norms allow advantaged parties to control this situation. This suggests that the judges' intention to educate was merely an option. The judges willing to educate do not appear to have a strong commitment to this intervention as a matter of fundamental fairness. Happily, the remaining questions in this chapter are not compromised and provide clear data.

The prior questions establish that judges largely avoid educating the parties about their rights and the range of trial outcomes. The educational function could be attributed to the goal of "informed consent" and thus thought of as one aspect of procedural fairness. On the other hand, the educational function is likely to affect the outcome, and thus could be thought of as an aspect of outcome fairness. The last three questions inquire about judges' willingness to get involved in aspects that relate to pure procedural fairness.

3. Judges' Willingness to Ensure Process Fairness

Until now, this discussion has focused on the extent to which judges in this situation (that they believe the emerging settlement substantially deviates from their opinion of the normal range of outcomes at trial) either recuse or educate the parties regarding their opinions of the legal rights and likely range of jury verdicts for similar cases. Three purely procedural fairness measures are: investigating whether the disadvantaged party is making a knowing waiver of his legal rights; checking for fraud, undue influence, or coercion; and clarifying the settlement judge's role.

Until now, roughly two-thirds (for represented parties) and one-half (for unrepresented parties) of the judges have exhibited a preference for neutrality. It is important to determine whether this trend continues with the purely procedural fairness factors.

i. Judges Ascertain if the Parties are Making a Knowing Waiver of Their Legal Rights (18D)

The exact wording of the survey question asked judges how often they "ask questions to ascertain if the parties are aware of their legal rights, but are knowingly and purposefully choosing to not exercise those rights." Informed consent is one indicator of process fairness. Parties informed of their legal rights might choose to forego those rights for a variety of reasons, including: the relational ramifications and emotional stress of a trial, collateral damage to innocent third parties like children, and a low-risk tolerance for the unpredictability of trial. A settlement judge who believes

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the emerging settlement substantially deviates from the normal range of trial outcomes should be less concerned if the parties have made knowing and purposeful waivers of those rights. The greater extent of judges avoiding this technique could confirm those judicial-settlement critics who question whether the mixture of roles is polluting judicial practice.³⁴

The judges' responses (Represented on the left and Not Represented on the right in each box) are:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10%	37, 20	42, 10	35, 25	18, 2	26, 0	11, 4	59, 6	17, 0
10- 40%	12, 6	5, 5	17, 9	10, 0	9, 0	6, 0	6, 13	33, 50
41- 60%	13, 12	8, 15	17, 6	12, 17	13, 16	6, 16	18, 31	17, 25
61- 90%	10, 18	13, 13	7, 25	16, 20	4, 13	39, 32	6, 44	0, 0
>90%	29, 44	32, 56	24, 34	45, 62	48, 71	39, 48	12, 6	33, 25

High-settling general civil judges are polarized about this technique when parties are represented, with 42% using it less than 10% of the time, compared to 32% using it more than 90% of the time. These judges may avoid using this technique with represented parties because they perceive it

³⁴ Robinson, *supra* note 1, at 341. There are three risks to judges performing settlement cases assigned to their docket; these include: "judicial overreaching, judicial over-commitment, and procedural unfairness [A] 'judge who makes such an investment [in helping to fashion a settlement] is unlikely to remain indifferent as to the outcome of the negotiations.'" *Id.* (quoting Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 359-361 (1986)). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 408 (1982). Resnik states that judicial involvement is especially troublesome if a judge is likely to hear matters in a settlement conference that are confidential and would not be permissible in a trial as evidence. In addition, Resnik cites that the amount of cases on a judges' docket may encourage them to settle rather than ensuring a fair settlement. See *e.g.*, *id.* at 385, 432.

to be interruptive to the attorney-client relationship. These judges defer to the attorneys' role of providing competent counsel and control their curiosity when perplexed by one side's decisions.

These same judges have dramatically different practices when the parties are unrepresented; they largely favor this practice with 56% of the judges asking these kinds of questions in more than 90% of their unrepresented cases compared to only 10% who rarely ask these questions in unrepresented cases. When the party getting a bad deal is not represented before a high-settling general civil judge, the judge is much more likely to ask questions to determine if this is an informed decision. One explanation is that in this situation the judge is not stepping on an attorney's toes, because the party is not represented. Another explanation could be the judge's recognition that the party is severely disadvantaged and the emerging settlement is disconcerting.

The low-settling general civil judges are polarized, but notice that their practices appear to be more constant between represented and unrepresented parties. Although some of these judges shift their practice toward using this technique more often in unrepresented cases, most of them appear to define this aspect of their role the same in unrepresented cases as in represented.

Family law judges are much more positively biased about using this practice; 45%–62% of the judges use it in more than 90% of their represented and unrepresented cases, respectively. The high-settling judges show some polarization with 26% using this practice in less than 10% of their cases.

This practice is highly disfavored among limited-jurisdiction judges in represented cases with 59% using it in less than 10% of their cases. The limited-jurisdiction judges shift their usage of this practice to 50% of them using it 61%–100% of the time when parties are unrepresented.

ii. *Judges Try to Ascertain Whether there is Fraud, Undue Influence, or Duress (18C)*

This question measures the extent to which settlement judges intervene to maintain a minimum standard of quality control of the emerging agreement. The characteristics of "free and willing" and an "absence of fraud, undue influence, or duress" are described as a minimum standard of quality control because those conditions are required for legal enforceability. Often a settlement judge will confirm these conditions when putting a settlement "on the record." This technique is a classic example of process fairness compared to outcome fairness. Judges who might be reluctant to share their opinions of the parties' legal rights and the likely outcomes at trial

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may be willing to ask questions to ascertain if minimum conditions necessary for contract enforcement are present. The judges' responses (Represented on the left and Not Represented on the right in each box) were:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10%	11, 6	8, 5	10, 6	12, 3	17, 3	11, 4	17, 6	0, 0
10-40%	3, 0	0, 0	7, 0	6, 2	4, 0	0, 4	17, 0	17, 25
41-60%	11, 6	8, 0	10, 9	6, 5	4, 0	6, 8	6, 12	33, 25
61-90%	17, 16	18, 10	24, 24	14, 8	4, 7	33, 8	22, 18	17, 0
>90%	59, 72	66, 85	48, 61	63, 84	70, 90	50, 77	39, 65	33, 50

As expected, the judges largely and uniformly embraced this practice. While it is generally prevalent, it is even more regularly practiced when parties are not represented. It should be noted that 8%–17% of judges rarely followed this practice for represented parties. Standing alone, those are relatively small percentages, but they may be perceived as significant when considering the deference the law awards to judicially supervised agreements.

The above questions measured process fairness by determining whether the parties exercised informed decisionmaking and were creating the agreement freely, willingly, and without fraud or duress. Another measure of process fairness might be the extent the participants understand the settlement judge's role. The next question explores that area.

iii. *Judge Confirms His Role as Only Assisting Parties in Reaching Their Settlement (18B)*

This is perhaps the most important question in this section because it explores the extent to which the settlement judge clarifies his role. Judges adopting a laissez-faire, "buyer beware" approach are harder to criticize if they disclose such an approach to the participants. The dangerous situation is

when the parties mistakenly perceive that the judge's facilitation of the agreement includes his tacit approval of the final outcome. His position as a judge, compared to a private mediator, and status in a public courtroom and chambers may reinforce the expectation for naïve parties that the settlement judge is a guardian of justice and fairness.

Judges choosing to lean toward the side of neutrality and take a more laissez-faire approach to fairness should at least inform unsophisticated parties about the hidden complexities of a settlement judges' duties and roles. This question inquires how often judges make such disclosures in cases where they observe the emerging settlement substantially deviating from the normal range of trial outcomes. The judges' responses (Represented on the left and Not Represented on the right in each box) were:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10%	26, 19	30, 16	14, 19	18, 20	27, 24	11, 19	28, 29	0, 0
10-40%	7, 16	5, 18	10, 19	8, 5	9, 0	11, 8	6, 0	0, 0
41-60%	15, 12	14, 5	14, 13	14, 13	14, 17	17, 8	11, 12	0, 0
61-90%	13, 15	5, 11	24, 19	16, 22	14, 28	22, 23	28, 29	67, 75
>90%	39, 38	46, 50	38, 31	43, 41	36, 31	39, 42	28, 29	33, 25

High-settling general civil judges are polarized on this practice when parties are represented; 46% do this more than 90% of the time and 30% do it less than 10% of the time. Low-settling judges are more biased toward using the technique in represented cases. For unrepresented cases, the high-settling judges shift towards using it more while the low-settlers shift towards using it less.

High-settling family law judges report a similar polarization, but the polarization is maintained in unrepresented cases. Low-settling family law judges are biased towards using this technique in represented cases and this bias is largely continued in unrepresented cases.

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While the judges who reported avoiding this technique are a minority, they constitute a significant percentage when considering the likelihood of a fundamental misunderstanding of the settlement judge's role. That these significant percentages of non-conforming judges persist in unrepresented cases should be a source of real concern. Judges may argue that experienced attorneys should know the complexity of serving as a judge and the multifaceted roles settlement judges fill when balancing between neutrality and fairness. Since the attorneys understand the situation, the judge does not need to explain it. The same argument is much harder to make when the participants are not represented.

B. Summary of the Data Regarding the Tension Between Neutrality and Fairness

The data about settlement judge techniques when they believe an emerging settlement substantially deviates from the normal range of outcomes at trial can be summarized by the following points:

1. Judges do not recuse themselves without an explanation.
2. Judges do not recuse themselves with an explanation that they thought the negotiations were producing an unbalanced outcome.
3. Judges are evenly spread regarding the practice of informing the parties of the judge's general perspective of their legal rights and the normal range of jury verdicts in similar cases. More judges avoid this practice than use it, but a significant percentage of judges use it. High-settling judges use it less than low-settling judges, with about half using it in less than 10% of their represented cases. There was not much of a distinction between the frequency for represented and unrepresented parties for general civil judges. In contrast, high-settling family judges used this technique more frequently with unrepresented parties.
4. The compound nature of the question prevents the authoritative interpretation of the data showing a low frequency of judges informing the parties of the normal range of jury verdicts, but recusing themselves as settlement judge if they meet serious resistance.
5. The compound nature of the question prevents authoritative interpretation of the data showing mixed results, but there appears to be a

largely negative bias regarding judges informing parties of the normal range of jury verdicts, but doing nothing if they meet serious resistance.

6. Judges are largely supportive of the practice of refraining from saying anything that implies their personal view of the settlement terms, which reveals a laissez-faire approach to the role. About half of general civil judges report using this more than 90% of the time compared to about one-third of family judges. High-settling general civil judges use it less than low-settlers, which means that high-settling judges are more willing to educate the parties. General civil judges use it less with unrepresented parties, suggesting a greater willingness to educate unrepresented parties.

7. Judges are conflicted regarding the practice of ascertaining if the parties are aware of their legal rights, but are knowingly and purposefully choosing to not exercise those rights. High-settling general civil judges are polarized about this technique when parties are represented. They largely favor this practice in unrepresented cases. Low-settling general civil judges are consistent in their polarization about this practice in both represented and unrepresented cases. Family law judges are much more positively biased about using this practice. This practice is highly disfavored among limited jurisdiction judges in represented cases but many of them use it fairly often in unrepresented cases.

8. Judges largely endorse the practice of ascertaining if the parties freely and willingly entered the agreement under circumstances that were free from fraud, undue influence, and duress.

9. Judges are conflicted about making sure the participants understand that the role of the judge in the settlement conference is to assist in reaching an agreement, even if it substantially differs from the normal range of trial outcomes. High-settling general civil judges are polarized on this practice when parties are represented. Low-settling judges are more biased toward using the technique in represented cases. For unrepresented cases, the high-settling judges shift towards using it more while the low-settlers shift towards using it less. High-settling family law judges are polarized in both represented and unrepresented cases. Low-settling family law judges are biased towards using this technique in all cases.

III. ISSUES RELATED TO SETTLING CASES ASSIGNED FOR TRIAL

The practice of a judge conducting a settlement conference for a case assigned to him for trial is an especially important area for investigation. The debate about this practice has been written about extensively.³⁵ The practice is controversial enough that some state supreme courts have forbidden the practice.³⁶ This article's contribution to this controversy is to document the judicial practice and perspective on the issue.

This was measured by asking judges to respond to the following:

7. The percentage of my settlement meetings that are for cases in which I am assigned as the trial judge is about: ____.
17. The county or district where I serve is organized so that when a case is assigned to me for trial the normal practice is; (Circle one)
 - A. I am the only judge available to conduct settlement conferences or mediations for that case.
 - B. I am welcome to conduct settlement conferences or mediations, but other judges are available for settlement conferences or mediations for that case.

³⁵ See *supra* notes 1, 6, and 8. See also E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 325 (1986). Elliot argues that judges' conducting their own settlement conferences has a positive effect in that they are capable of "stimulat[ing] settlements that [the judges] consider[] to be in the interest of justice." *Id.* See also Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 350 (1986). Schuck also states some of the advantages of judges' involvement, including "control over the disposition of certain issues; knowledge about other factors relevant to settlement of the case; the judge's reputation for fairness; and control over certain inducements and administrative supports." *Id.* However, there are also several critics against judges conducting settlement cases also assigned to their dockets. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 511 (1985). Menkel-Meadow argued against the use of the trial judge in a settlement conference in order to protect "interests and considerations that might effect a settlement but would be inadmissible in court [which could] prejudice a later trial." *Id.*

³⁶ The Connecticut Supreme Court has ruled that "[w]hen a judge engages in a pretrial settlement discussion in a court case, he should automatically disqualify himself from presiding in the case in order to eliminate any appearance of impropriety..." *Timm v. Timm*, 487 A.2d 193, 193 (Conn. 1985). The Montana Supreme Court requires the disqualification of a judge who will be trier of fact if that judge participates in unsuccessful pretrial settlement negotiations and is requested to do so by one of the parties. See *Shields v. Thunem*, 716 P.2d 217, 218-19 (Mont. 1985).

C. I am discouraged from conducting settlement conferences or mediations for that case.

16. The average number of civil or family cases that are/were assigned to me per year is about _____.

10. If a case has been assigned to you for trial, do you use different practices/techniques in conducting mediations or settlement conferences than if the case is not assigned to you for trial? YES NO
(circle one)

If yes, please describe how the practices/techniques that you use differ.

12. If I have revealed my appraisal of the value of the case in settlement discussions and the case does not settle, I am concerned about the parties' perceptions of my neutrality.

13. If a case does not settle, my later substantive decisions are affected by the information I learned in settlement discussions because I am:

13A. Impacted by inadmissible or confidential information;

13B. Wanting to validate my prediction of the value of the case;

13C. Resenting the party who was unreasonable and caused the impasse.

15. I encourage settlements by:

15A. Expediting ruling on a motion;

15B. Delaying ruling on a motion;

15C. Scheduling additional settlement discussions if the case does not settle;

15D. Other: _____

The responses to these questions will reveal the frequency and circumstances of the practice; whether and how judges modify their settlement conference techniques when they are the trial judge; and the judges' concerns and perceptions about the impacts of this practice. The first three questions focus on the percentage of settlement conferences for cases assigned to that judge for trial, the judges' perceptions of alternatives, and the size of the caseload being assigned to the judge. It is expected that the frequency of this practice will be affected by the size of the caseload and whether judges perceive that other judges are available for this function.

The next question asks the judges to comment on whether and how their settlement conferences are different when they are the trial judge. The stereotype is that there would be little difference in the judges' techniques.

The last three questions explore whether judges are concerned about three things: party perceptions regarding neutrality during a trial after the judge expresses her views in a settlement conference; the extent that the judge's decisions during a trial are affected by information learned in settlement discussions; and the extent to which judges use some of their powers as the trial judge to encourage settlement.

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The first area of inquiry seeks to determine the extent of this practice. Is this practice prevalent, or is this merely an academic controversy?

A. The Judges' Docket

The first task is to understand how often the settlement judge is also the trial judge and the environment surrounding that phenomenon.

1. Percentage of Settlement Conferences in Which the Judge is the Trial Judge (7)

The question presented was: "The percentage of my settlement conferences that are for cases in which I am assigned as the trial judge is about ____." The data is reported by grouping the frequency of this occurrence in the left-hand column and then reporting the percentage of various types of judges reporting that frequency.

The judges' responses were:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
0%	30	18	42	7	9	3	16	33
1-20%	14	14	18	7	12	0	10	17
21-50%	8	10	7	11	3	13	0	0
51-90%	17	16	16	13	12	27	5	17
>90%	32	40	17	64	67	65	68	33

The data for the general civil bench created almost perfect symmetry in a polarized response, with 32% of general civil judges reporting that they are the trial judge in more than 90% of their settlement conferences contrasted with 30% of general civil trial judges reporting that they are the trial judge in

0% of their settlement conferences.³⁷ In contrast, the practice was very prevalent among family law judges, with 64% of family law judges reporting that they are the trial judge in more than 90% of their settlement conferences and only 7% of family law judges reporting that they are the trial judge in 0% of their settlement conferences.

The profiles for high and low general civil settlers are especially intriguing. Forty percent of high-settling general civil judges were also the trial judges in more than 90% of their cases, compared to only 17% of low-settling judges. Forty-two percent of low-settling judges were the trial judges in 0% of their cases. There appears to be a correlation between being a high or low settler depending on whether the settlement judge was also the trial judge. This could mean that trial judges push harder to settle their own cases compared to judges who are not the trial judge, but there could be other explanations, i.e. the trial judge has more of a relationship and influence than another judge.

This data suggests the need to investigate whether high-settling judges who are also the trial judge are using more directive techniques (that could be characterized as bullying) compared to low-settling judges who are not the trial judge. A danger of having the trial judge also serve as the settlement judge is that the judge has too many incentives to settle the case. The data regarding the correlation between high-settling judges who are also the trial judges using more directive techniques was examined by comparing the responses to questions suggesting a directive technique with the responses to this question. The data showed there were no statistically significant correlations between high-settling judges who were also the trial judge using directive techniques. In fact, there was a slight negative trend with these judges expressing their opinions on the likely outcome of the case at trial. The concern about trial judges settling their own cases by being directive is not confirmed by the data.

In contrast, the frequency of this practice is consistently high among high and low-settling family judges.

This data must be examined in the context of the next two questions: the availability of alternatives and the caseload carried by judges. First, we will examine the data in isolation and then look for correlations to further investigate why high-settling general civil judges conduct more of their own settlement conferences than low-settling general civil judges, and why this

³⁷ Because the judges filled in a blank, the percentages in the left-hand column are grouped differently.

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practice is more prevalent among family judges. This data could document the benefit of judicial leaders in a given county establishing alternatives.

The next question explores the respondent's institutional culture regarding this practice.

2. Culture and Alternatives in that Judge's Jurisdiction (17)

The question presented asked:

The county or district where I serve is organized so that when a case is assigned to me for trial, the normal practice is: (Circle one)

A. I am the only judge available to conduct settlement conferences or mediations for that case;

B. I am welcome to conduct settlement conferences or mediations, but other judges are available for settlement conferences or mediations for that case;
or

C. I am discouraged from conducting settlement conferences or mediations for that case.

The number (not percentages) of responses were as follows:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
A	29	15	9	41	16	15	14	1
B	64	26	20	23	14	9	7	3
C	13	4	6	6	3	2	0	2

It is essential to understand a judge's context when seeking to interpret her settlement assistance practices. If the county or district where she sits is organized so that she is the only judge available to conduct settlement conferences for cases assigned to her for trial, then her practice of conducting such processes is systemic rather than individual.

It is interesting to observe the contrasting culture for various assignments. Fifty-eight percent (41 out of 70) of family law trial judges report being the only judge available to conduct settlement conferences. In contrast, 27% (29 out of 106) of general civil trial judges report being the

only judge available to conduct settlement conferences. The data for the prior question establishes that 64% of family judges report that more than 90% of their settlement conferences are for cases assigned to them for trial, compared to 32% for general civil. This frequency is very similar to the reported incidents of being the only judge available for this function: 58% for family and 27% for general civil. Apparently, about 5% of judges in both assignments choose to conduct almost all of the settlement conferences for their cases assigned for trial; the others seem to have no choice.

The presence of choice for general civil judges is furthered by the report of 60% of general civil judges that they were welcome to conduct settlement conferences but had other judges available for this purpose. These judges appear to operate in a culture that allows, but does not require, referrals to a designated or buddy system settlement judge. The advantage of referring the settlement conference to a non-trial judge is that the settlement judge does not have an unhealthy incentive to push settlement. The weakness of such a system is that the trial judges' "docket inventory" is dependent on other judges' settlement abilities. A high-settling judge might assist the other judges in reducing their caseloads, while his caseload balloons. Court administrative offices often keep records of individual judge's inventories which contribute to opinions about which judges are effective and efficient.

The contrast between family law and general civil settlement process structural norms is interesting. Most family law judges are expected to conduct their own settlement processes, but they must preside over bench trials for cases that do not settle. Most general civil judges can refer cases assigned to them for trial to another judge for settlement purposes, but usually general civil judges preside over jury trials for cases that do not settle. This contradicts the observation that it is more problematic for a trial judge to try to settle a case assigned to her for trial when the trial would be a bench trial.

The data suggests that this issue is largely academic, because only approximately 10% of trial judges in both general civil and family report being discouraged from conducting their own settlement conferences. The debate is interesting, but the practice is largely accepted among judges.

What is significant is that none of the limited jurisdiction civil judges feel discouraged from conducting settlement processes for their own cases. In contrast, 10% of general civil judges reported feeling discouraged. The low number for limited jurisdiction judges could be attributed to an inadequate sample (only 21). On the other hand, it could also reflect a distinction in culture and resources for smaller civil cases. The next question reveals that limited jurisdiction civil judges report a larger caseload than that of general

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civil judges. It is no surprise when a judge, being the only judge available, conducts settlement processes for cases assigned to them for trial. Likewise, it is not surprising that those judges who are discouraged from this practice refrain. The interesting data is how often judges conduct settlement meetings for cases assigned to them for trial when they could have requested assistance from another judge. This data is probably the best indicator of judges' attitudes and preferences about conducting settlement meetings for cases assigned to them for trial. The 64 general civil judges who could have referred the settlement conference to another judge reported the following frequencies that their settlement conferences were for cases in which they were the trial judge:

Percentage of settlement conferences that they were the trial judge	Percentage of general civil judges who had a choice, but reported this percentage of serving as settlement judge and trial judge
0%	19%
1-20%	19%
21-50%	9%
51-90%	21%
>90%	32%

This data is roughly the same as for all the judges. The similar polarization reveals that the difference in practice on this issue has as much to do with judicial philosophy as court structure.

3. *Volume of Cases Assigned (16)*

The question presented was, "The average number of civil or family cases that are/were assigned to me per year is about ____."

This question is important because docket management is one of the factors that could affect the frequency with which a trial judge utilizes settlement conferences. Judges with a large volume of incoming cases might be expected to use more settlement conferences. This docket management pressure may contribute to a culture in which the judge conducts her own settlement conferences. The hypothesis is that the higher the caseload, the greater the frequency of judges conducting their own settlement conferences.

The data is reported showing the number of cases assigned each year on the left-hand column and the percentages of various categories of judges who report having that range of cases assigned.

	General Civil All	General Civil Top 1/3	General Civil Bottom 1/3	Family All	Family Top 1/3	Family Bottom 1/3	Limited Jurisdiction	Complex Civil
<200	30	28	42	18	19	20	30	34
200- 550	51	56	53	30	29	25	30	66
550- 900	10	4	12	0	5	7	6	0
900- 1700	8	4	0	24	15	15	12	0
1700- 2500	1	2	0	19	14	11	6	0
> 2500	2	4	0	12	25	8	18	0

Eighty-nine percent of the general civil judges responding to the question were assigned fewer than 900 cases per year, with 30% and 51% assigned fewer than 200 cases and between 200 and 550 respectively. This compares with 55% of family judges reporting more than 900 cases assigned each year. The phenomenon of 64% of family judges serving as settlement judge for cases when they also serve as trial judge, compared to only 32% of general civil judges,³⁸ might be explained by the family judges' dramatically greater caseloads combined with an environment in which other judges are not available to receive a referral for settlement conferences.

High-settling judges have a higher number of assigned cases per year than low-settling judges. The concern is whether judges with a large caseload are exerting inappropriate pressure to settle in order to manage their docket. Even if the settlement judge is not exerting the pressure, it is possible that parties settle because they anticipate that a judge with an annual new caseload of more than 2,500 cases will not have the time to try the case. Likewise, the 42% of general civil judges who are assigned less than 200 cases each year are low-settling judges because the judge and parties do not have the same urgency that the case can only be resolved by settling.

³⁸ See *supra* data from Sec. III.A.1.

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The author tested the hypothesis regarding whether judges assigned more cases were more likely to conduct their own settlement conferences by comparing the frequency of the occurrence between clusters of judges. For example, of the general civil judges who are assigned more than 550 cases each year, 61% reported that more than 90% of their settlement conferences were for cases in which they were the trial judges. In contrast, of the general civil judges who are assigned less than 200 cases each year, only 20% reported that more than 90% of their settlement conferences were for cases in which they were the trial judges. The hypothesis was confirmed.

Having confirmed that a significant percentage of judges conduct settlement conferences for cases in which they are assigned as trial judge, the next area of inquiry is how this affects the settlement or adjudicatory functions.

B. Different Techniques When the Settlement Judge is the Trial Judge

All prior questions simply inquired as to the judges' approaches and techniques in settlement conferences. The next level of analysis focuses on a trial judge acting as the settlement judge for her own cases. The judges were asked if their settlement conference techniques are different when they are the trial judge, and if so, how.

1. Do Judges Use Different Settlement Techniques When They are the Trial Judge?

The question presented asked: If a case [is] assigned to you for trial, do you use different practices/techniques in conducting mediations or settlement conferences than if the case is not assigned to you for trial? YES NO (circle one).

The number of judges answering yes and no are:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
Yes	48	18	21	18	10	7	3	2
No	49	27	14	37	17	14	15	3

This data shows that judges are fairly split over whether they use different mediation techniques when they know they are going to be the trial judge if the case does not settle. Initially, one might assume that judges use different techniques in order to allow for full impartiality if a trial occurs. However, this is interesting because the results show that many judges do not usually change their technique when conducting a settlement conference assigned to them for trial. Here the evidence shows that the judges believe their methods to be fair or just in conducting both the settlement conference and the needed trial.

2. What are the Different Settlement Techniques? (10)

The question presented asked, “If yes, please describe how the practices/techniques that you use differ.”

One hundred five judges provided comments. This is a good response rate considering that 30% of 129 general civil judges and 7% of 72 family judges completing the survey report that they are never the settlement judge for cases assigned to them for trial. Subtracting those judges from the pool leaves 156 judges who report that they serve as the settlement judge for cases assigned to them for trial. Of those 156, 105 commented on how their practices/techniques differ when in this situation.

The most prevalent comment by far was that if the settlement judge is also assigned as the trial judge, she must be less expressive of her opinions. Fifty-six of the judges’ comments made this point. Representative statements of how their settlement judge techniques differ when they are also the trial judge include:

- Less intrusive and not reveal a strong judgmental conclusion;
- Less predicting outcome on how I will rule;
- More careful in expressing views;
- Less open with parties;
- More circumspect;
- No opinions on legal, substantive, or evidentiary issues;
- Not express opinion on evidence, strategy, or value;
- Avoid assessing strengths and weaknesses;
- Give no assessment of the case—only talk about finality and certainty;
- Much more reserved and restrained. Offer no opinions on facts or outcome, just legal issues;
- Less likely to state my opinion of the case for fear of pre-judging it and so parties/attorneys do not lose confidence in impartiality;

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- Avoid pre-judging legal issues, limit my comments or use qualifiers such as, "subject to reading later briefs" or "at first blush;"
- Not as strong in evaluation, more of a facilitator; and
- Not as aggressive in my attempt to settle.
- Other judges made the same point by describing more willingness to state opinions in settlement conferences when they were not the trial judge. Again, representative comments of their techniques when they were not the trial judge include:
 - More direct and candid in my assessment of their chances for success;
 - More interactive with clients and more focus on what evidence they have to prove;
 - Can be more evaluative;
 - More assertive in explaining strengths and weaknesses and can emphasize my educated prediction of the outcome at trial;
 - Can tell them what I would order at trial, if I were the trial judge; and
 - Free to discuss my real feelings about their case.

In contrast, eight judges expressed the exact opposite: when they are the settlement judge for a case assigned to them for trial, they can be more directive. Representative comments of judges expressing a more directive settlement conference approach when they will be the trial judge include:

- Be specific about when they will go to trial and more direct about factors to consider in evaluating the case;
- Resolve motions in limine and other motions which would affect the value of the case;
- If certain evidence is clearly admissible or inadmissible, I will tell the parties if both sides want to know;
- More emphasis on possible outcomes and why;
- More strict and stick to the facts and law, no emotions;
- More active in reaching a settlement.

Compared to judges who reported a more directive role, seven times as many settlement judges who are also the trial judge reported restraint. If guidance is determined by safety in numbers, then the prevailing wisdom is for the settlement judge who is also the trial judge to be more guarded in the expression of his opinions.

The next most frequent theme in the comments regarded party consent for the trial judge to serve as the settlement judge. A total of seventeen judges expressed concern on this issue. Five stated they attempt to settle a case assigned to them for trial only if the parties consent. Another six stated

they do it only with waivers on the record. Another six stated they only do it when the parties request it.

The next most frequent theme in the comments regarded how the communication dynamics are affected when they are both the trial and settlement judge. Representations of the eleven judges' statements on this theme include:

- I instruct the parties to not reveal confidential facts;
- No ex parte communications;
- I explain they should not tell me things they don't want me to know since I will be the trial judge;
- Don't talk directly with parties on bench trial cases;
- Work more with attorneys and less with parties;
- Ask less about facts and previous offers;
- Less active and do not work as hard or long to settle.

The next most frequent theme in the comments regarded how the negotiation dynamics are affected when they are both the trial and settlement judge. The five judges' statements on this theme include:

- I do not get involved in specific offers and demands;
- Not as creative or energized; and
- When I am not the trial judge, I meet with attorneys separately to try to understand their bottom line, which they are unwilling to disclose to their opponent.

The last two comments worthy of mention are:

- Three judges stated they would not serve as settlement judge if they were the trial judge in a bench trial, but would if the trial would be a jury trial; and
- I am clearer in my explanation regarding my role as settlement judge versus my role as trial judge.

A composite summary of these comments: If the parties give the trial judge permission, she can try to settle the case, but she should be less expressive of her opinions and acknowledge that the parties may need to be more guarded in their disclosures to the settlement judge. The survey investigated the frequency that judges were concerned about potential areas of specific concern when the trial judge also serves as the settlement judge.

C. Potential Concerns About Combining the Settlement and Adjudicatory Roles

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Section III.A.1 above established that the civil bench is polarized about the trial judge serving as the settlement judge: 32% of general civil judges report that this is true for more than 90% of their settlement conferences compared to 30% reporting that it is never true. The family bench did not report this same polarization, with 64% reporting that more than 90% of their settlement conferences are for cases in which they are the trial judge and only 7% reporting that they never do this.

Anticipating that this practice would be controversial, the questionnaire asks the judges the frequency of occurrence of three specific areas of concern. The instructions for each of these three questions asked, “based on your practice for cases assigned to you for trial, please provide your best estimate of the percentage of settlement conferences in which the following statements apply.”

1. *Parties’ Perceptions of Neutrality if the Case Does Not Settle* (12)

One of the anticipated concerns regards parties’ perceptions of neutrality if the case does not settle. This concern was confirmed by the judges’ narrative comments regarding how their settlement technique differs when they are the trial judge. The exact question presented was: “If I have revealed my appraisal of the value of the case in settlement discussions and the case does not settle, I am concerned about the parties’ perceptions of my neutrality.”

The judges’ responses were:

	General Civil All	General Civil Top 1/3	General Civil Bottom 1/3	Family All	Family Top 1/3	Family Bottom 1/3	Limited Jurisdiction	Complex Civil
1	30	38	17	31	42	23	29	20
2	17	18	10	14	16	12	19	20
3	14	11	17	14	16	12	10	0
4	13	9	23	17	10	15	14	20

5	30	24	33	25	16	39	29	40
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This question applies directly to the issue of judges trying to settle cases assigned to them for trial. If a judge expresses her appraisal of the value of the case during an unsuccessful settlement process, will the parties have a perception that the judge has established opinions regarding the matter and is therefore no longer neutral? Remember that a judge may need to disqualify herself if there is an appearance of bias.³⁹

It is interesting that general civil judges are evenly polarized on this issue, with the reported frequency categories of more than 90% and less than 10% each attracting 30% of the judges. This is almost exactly the result regarding how often a judge's settlement conference is for a case in which he is assigned as trial judge. The degree of concern about party perceptions of neutrality could explain why judges choose or refuse to conduct settlement conferences for cases assigned to them for trial.

This balanced polarization takes a different slant when comparing high and low-settling general civil judges. Only 33% of the high-settling judges have this concern in more than 60% of their cases compared to 56% of low-settlers. The suggestion that high-settling general civil judges are concerned about this less than low-settling judges is confirmed by the data. Thirty-eight percent of high-settling judges are concerned about this in less than 10% of their cases compared to only 17% of low-settling general civil judges.

This data provides one explanation of the difference between high and low-settling general civil judges. High-settling general civil judges are more often trying to settle a case assigned to them for trial.⁴⁰ Therefore, they are less concerned about party perceptions of neutrality and thus likely to be more willing to reveal their evaluation of the case. Low-settling general civil judges are more concerned about party perceptions of neutrality and thus are likely to be more restrained in the expression of their opinions.

Concern about party perceptions of neutrality after expressing an appraisal of the case in a settlement conference would likely be a greater concern when the judge is conducting a bench trial. For some reason, this anticipated amplification of concern when the judge is conducting a bench trial is disproved for family law judges because the frequency of concern was

³⁹ See *supra* note 32.

⁴⁰ See generally *supra* Sec.III.A.1.

the same for family law judges, who regularly conduct bench trials, and general civil judges, who usually conduct jury trials.

This problem is avoided if either the case settles or the judge does not express her appraisal of the value of the case. The level of concern expressed by many of the judges confirms that this is an area for further exploration.

2. Subsequent Substantive Decisions Affected by Settlement Discussions (13)

Party perception of neutrality is not the only potential controversy arising out of trial judges trying to settle their own cases. Another concern is the impact on the quality of the subsequent substantive rulings in the trial. The next question probes the judges' perceptions of how frequently their later substantive decisions are compromised by having served as settlement judge.

The exact question presented was, "If a case does not settle, my later substantive decisions are affected by the information I learned in settlement discussions because I am ..." and then lists three potential problems.

i. Exposed to Inadmissible or Confidential Information

A significant concern about trial judges conducting settlement meetings for cases assigned to them for trial is that the information they learn in the settlement process could poison an otherwise fair trial. This question inquires how often judges are aware that confidential or inadmissible information acquired in the settlement process impacts their later substantive decisions.

In the course of a settlement conference, a judge could easily be exposed to inadmissible or confidential information. The atmosphere is usually informal and the rules of evidence do not apply. The question presented to the judges was how often the following statement was true for them: "If a case does not settle, my later substantive decisions are affected by the information I learned in settlement discussions because I am impacted by inadmissible or confidential information."

The judges' responses were:

	General Civil All	General Civil Top 1/3	General Civil Bottom 1/3	Family All	Family Top 1/3	Family Bottom 1/3	Limited Jurisdiction	Complex Civil
<10%	80	89	67	79	81	69	86	100
10- 40%	14	11	20	8	3	15	9	0
41- 60%	4	0	10	9	6	15	0	0
61- 90%	0	0	0	3	6	0	0	0
90% (+)	2	0	3	2	3	0	5	0

The vast majority of the judges reported a frequency of less than 10% of the time. This problem with trial judges serving as settlement officers is so transparent that judges would be exposed to an obvious self-serving bias (not to see oneself negatively). Although the overall numbers are low, about 20% of both general civil and family law judges report this occurring.

ii. *The Judges' Desire to Validate Predictions (13b)*

When a judge makes a prediction of the value of a case in the settlement process, she may become invested in that prediction and be influenced by a desire to validate that prediction when making later substantive decisions. Clearly this is not appropriate and thus the self-serving bias is operable again in the survey results. Another factor when interpreting these results is that this phenomenon may be unconscious for the judge and thus his assessment is untrustworthy. The exact question presented was: "If a case does not settle, my later substantive decisions are affected by the information I learned in settlement discussions because I [want] to validate my prediction of the value of the case."

The judges' responses were:

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	General Civil All	General Civil Top 1/3	General Civil Bottom 1/3	Family All	Family Top 1/3	Family Bottom 1/3	Limited Jurisdiction	Complex Civil
<10%	92	98	83	88	88	85	77	100
10- 40%	5	2	7	5	3	8	18	0
41- 60%	1	0	3	5	3	8	0	0
61- 90%	1	0	3	5	6	0	5	0
90% (+)	1	0	3	0	0	0	0	0

After acknowledging all the caveats, the data suggests that about 90% of judges report this occurs less than 10% of the time. About 10% of judges acknowledge this phenomenon does occur.

iii. *The Judge Resents a Party Who Was Unreasonable About Settlement (13C)*

A settlement judge may form a negative opinion about a party due to their unreasonable expectations or negotiating approach. When that party's unreasonableness necessitates a trial, that party has increased the judge's workload because she needs to try the case. It is foreseeable that a judge might resent the party whose unreasonableness creates more work for the judge. This question documents the frequency judges believe their later substantive decisions are impacted by resentment towards the unreasonable party. The exact question presented was: "If a case does not settle, my later substantive decisions are affected by the information I learned in settlement discussions because I [resent] the party who was unreasonable and caused the impasse."

The judges' responses were:

	General Civil All	General Civil Top 1/3	General Civil Bottom 1/3	Family All	Family Top 1/3	Family Bottom 1/3	Limited Jurisdiction	Complex Civil
<10%	92	96	83	88	88	89	91	80
10- 40%	6	5	10	8	9	4	5	20
41- 60%	2	0	7	5	3	8	5	0
61- 90%	0	0	0	0	0	0	0	0
90% (+)	0	0	0	0	0	0	0	0

As with the preceding two questions, the results are impacted by the self-serving bias and are susceptible to concerns about whether the judges are aware of the impact of such feelings. Predictably, the judges reported this phenomenon as a rare occurrence. It is interesting to note that about 10% of judges admit this phenomenon does occur.

3. *How Trial Judges Encourage Settlement*

A trial judge can encourage settlement by expediting or delaying a ruling on a motion or by scheduling additional settlement conferences. These approaches can be used to purposefully clarify or cloud risks at trial or to keep the parties focused on the task of settlement.

i. *Expediting a Ruling on a Motion (15A)*

There are times when the parties are in a better position to assess the value of their case after the ruling on a motion. Sometimes resolving pretrial motions regarding conflicts over legal issues, including the admissibility of certain evidence, enables each party to gauge the risks and rewards of proceeding to trial. The question presented to the judge was how often he “encourage[s] settlements by expediting ruling on a motion.”

The judges’ responses were:

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	General Civil All	General Civil Top 1/3	General Civil Bottom 1/3	Family All	Family Top 1/3	Family Bottom 1/3	Limited Jurisdiction	Complex Civil
<10%	36	44	24	28	23	32	64	0
10-40%	25	21	28	11	13	8	9	0
41-60%	22	23	28	25	23	32	18	33
61-90%	10	9	17	16	13	16	5	17
90% (+)	7	2	3	20	27	12	5	50

This data documents that 60% of general civil and 39% of family judges do this less than 40% of the time, but many judges do expedite ruling on some motions for the purpose of encouraging settlement. It is surprising that this practice is more common in family law than in general civil. It is not considered controversial for a judge to do this, so there should not be much of a self-serving bias for this question.⁴¹

ii. *Delaying a Ruling on a Motion (15B)*

It is also true that sometimes a judge can encourage settlement by delaying ruling on the same kinds of motions as identified in the above question. The delay in ruling on a motion can encourage settlement because it maintains uncertainty for the parties. A successful summary judgment motion is dispositive of the case. A judge might intentionally delay ruling on such a motion so that the parties can further explore settlement. A judge is probably more willing to admit to expediting a ruling because the implication is that justice is being delivered more quickly. It would be more difficult for a judge to admit to an intentional delay in ruling on a motion as a means of encouraging settlement, as the implication would be that clarity on legal issues is being withheld and justice thereby intentionally subverted.

⁴¹ Predictably, this practice is fairly common in complex civil cases and comparatively rare in limited jurisdiction civil cases.

The question presented was how often the following statement is true: "I encourage settlements by delaying ruling on a motion."

The judges' responses were:

	General Civil All	General Civil Top 1/3	General Civil Bottom 1/3	Family All	Family Top 1/3	Family Bottom 1/3	Limited Jurisdiction	Complex Civil
<10%	47	54	43	63	67	60	62	33
10- 40%	16	14	17	19	20	20	29	0
41- 60%	25	23	23	9	7	12	10	67
61- 90%	9	7	17	8	3	8	0	0
90% (+)	3	2	0	2	3	0	0	0

Even with the potential negative connotation, 37% of general civil judges report doing this in more than 40% of their cases.

iii. *Scheduling Additional Settlement Conferences*

One of a judge's prerogatives is to order stubborn parties to attend additional settlement meetings. As with most things, this practice is appropriate in moderation. In excess, it causes parties to perceive that the practice is designed to wear them down and convince them to forego their right to a trial. The latter interpretation is more tempting when the settlement judge is also the trial judge. The question inquired how often the judge encourages settlement by requiring parties to participate in another settlement conference.

The judges' responses were:

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	General Civil All	General Civil Top 1/3	General Civil Bottom 1/3	Family All	Family Top 1/3	Family Bottom 1/3	Limited Jurisdiction	Complex Civil
<10%	15	16	13	17	13	19	43	20
10-40%	19	13	30	11	13	12	19	20
41-60%	22	20	23	14	13	8	10	0
61-90%	30	36	23	35	30	46	24	0
90% (+)	15	16	10	23	30	15	5	60

Although the question was not designed to differentiate between legitimate and abusive uses of this judicial prerogative, it does document that judges consciously use this technique to encourage settlement in more than half of their cases.

iv. *Other Measures (15D)*

The question provided an opportunity for judges to write a narrative on other things they do as trial judges to encourage settlement. Representative suggestions are:

- Making MSC's readily available and having a good track record for success;
- Intervening early in the case, before positions in family law cases harden;
- Postponing until potentially dispositive motions are heard;
- Making orders on primary issues;
- Not being too available for settlement conferences;
- Discussing settlement at every status conference and most motions;
- Strongly encouraging parties/attorneys to have completed all discovery/appraisals/ evaluations prior to settlement conferences and meeting with each other prior to court settlement conferences;
- Holding to trial dates;

- If the parties are very close, I let them know the presiding judge will likely trail or reset them until either the attorneys retire from practice or they settle;
- Discussing the strengths and weaknesses of the case;
- Emphasizing costs, emotional distress, uncertainty of litigation;
- Taking the parties' emotions out of the case and discussing predicted verdicts;
- Pointing out that a settlement is certain and resolves collection of judgment and/or can avoid entry of judgment on the record;
- If the case does not settle, making sure they know how far apart they are and encouraging continued conversations between them. Often cases that don't settle at the conference will settle before trial. I like to believe the settlement conference had an impact; and
- Putting in place a "temporary" or "conditional" ruling (e.g. on custody/visitation matters) so that parties can see how it is working out, and allowing the matter to be restored to calendar within time limits if there are problems.

D. Summary of Data Regarding the Settling of Cases Assigned for Trial

1. The general civil bench is almost perfectly polarized regarding the practice of conducting settlement conferences for cases in which they are assigned as the trial judge. Thirty-two percent of general civil judges report that more than 90% of their settlement conferences are for cases in which they are the trial judge, compared with 30% of general civil judges who report that 0% of their settlement conferences are for cases in which they are the trial judge. In contrast, the practice was very prevalent among family law judges, with 64% of judges reporting they are the trial judge in more than 90% of their settlement conferences, and only 7% reporting they are the trial judge in 0% of their settlement conferences.

The contrast between high and low general civil settlers is especially intriguing. Forty percent of high-settling general civil judges were also the trial judges in more than 90% of their cases compared to only 17% of low-settling judges. Forty-two percent of low-settling judges were the trial judge in 0% of their cases. There appears to be a correlation between being a high or low-settler depending on whether the settlement judge was also the trial judge. This could mean that trial judges push harder to settle their own cases compared to judges who will not be the trial judge. In contrast, the frequency of this practice is constantly high among high- and low-settling family judges.

2. Various jurisdictions and assignments have different expectations and capacities regarding judges conducting settlement conferences for cases assigned to them for trial. Fifty-eight percent (41 out of 70) of family law trial judges report being the only judge available to conduct settlement conferences. In contrast, 27% (29 out of 106) of general civil trial judges report being the only judge available to conduct settlement conferences.

A prior question establishes that 64% of family judges report that more than 90% of their settlement conferences are for cases assigned to them for trial, compared to 32% of general civil judges. This frequency is very similar to the reported incidents of being the only judge available for this function: 58% for family and 27% for general civil. Apparently about 5% of judges in both assignments choose to conduct almost all of the settlement conferences for their cases assigned for trial; the others appear to have no choice. The presence of choice for general civil judges is furthered by the report of 60% of general civil judges that they were welcome to conduct settlement conferences but had other judges available for this purpose.

The contrast between family law and general civil settlement process structural norms is interesting. Most family law judges are expected to conduct their own settlement processes but must preside over bench trials for cases that do not settle. Most general civil judges can refer cases assigned to them for trial to another judge for settlement purposes but usually preside over jury trials for cases that do not settle. This contradicts the anecdotal comments that it is more problematic for a trial judge to try to settle a case assigned to her for trial when the trial would be a bench trial.

The data suggests that this issue is largely academic, because approximately 10% of trial judges in both general civil and family law report being discouraged from conducting their own settlement conferences. The debate is interesting, but the practice is largely accepted among judges.

3. One of the factors affecting judges conducting settlement conferences for cases assigned to them for trial is the volume of cases assigned to them. The data revealed that the more cases assigned to a judge, the more likely she was to conduct settlement conferences on cases when she is also the trial judge.

4. Some judges report that whether they are the trial judge does not affect their approach and technique in settlement conferences. Most judges report that they are less aggressive in their settlement techniques when serving as the trial judge. Their explanations largely point to their concerns

about prejudging the case or losing their impartiality or neutrality. Some judges also note that the parties cannot be as transparent in a settlement conference with the trial judge. Many judges comment that this should be done only with the parties' permission.

5. General civil judges are evenly polarized as to whether they are concerned about parties' perceptions of neutrality when they act as trial judge after expressing an appraisal of the case in settlement discussions. Thirty percent of judges report having such concerns more than 90% of the time they are in that situation. Thirty percent of judges report having such concerns less than 10% of the time they are in that situation. This balanced polarization takes a different slant when comparing high-settling and low-settling general civil judges. Only 33% of the high-settling judges have this concern in more than 60% of their cases compared to 56% of low settlers. This suggestion that high-settling general civil judges are concerned about this less than low-settling judges is confirmed by the data that 38% of high-settling judges are concerned about this in fewer than 10% of their cases compared to only 17% of low-settling general civil judges. Thus, one explanation of the difference between high and low-settling general civil judges is that high-settling judges are less concerned about party perceptions of neutrality and thus are likely to be more aggressive with their settlement techniques.

Concern about party perceptions of neutrality after expressing an appraisal of the case in a settlement conference would seem likely to be a greater concern when the judge would be conducting a bench trial. For some reason, this anticipated amplification of concern when the judge is conducting a bench trial is disproved for family law judges because the frequency of concern was the same for family law judges, who regularly conduct bench trials, and general civil judges, who usually conduct jury trials. The data for family law judges mirrors that of general civil judges regarding high-settling judges being less concerned about party perceptions of neutrality compared to low-settlers.

6. The vast majority of trial judges report that confidential or inadmissible information acquired in the settlement process rarely impacts their later substantive decisions if the case does not settle. Twenty percent of general civil and family law judges confirm that this phenomenon does occur.

OPENING PANDORA'S BOX

7. The vast majority of trial judges report that the desire to validate their prediction of the value of the case during settlement discussions rarely affects their subsequent substantive decisions if the case does not settle. About 10% of general civil and family law judges confirm that this phenomenon does occur.

8. The majority of trial judges report that resentment toward the unreasonable party who caused the impasse rarely affects their subsequent substantive decisions if the case does not settle. About 10% of judges report that this phenomenon does occur.

9. Most general civil judges do not encourage settlements by expediting a ruling on a motion. High-settling general civil judges disfavored this practice more than low-settling general civil judges. Family law judges were evenly distributed regarding the frequency with which they utilize this practice and there was a great deal of difference between high and low-settling family law judges.

10. Most general civil and family law judges do not encourage settlement by delaying ruling on a motion. This practice is not uniformly followed since 25% of general civil judges report doing this in between 40% and 60% of their cases. This practice is more disfavored by family law judges.

11. Judges are evenly distributed regarding the frequency with which they encourage settlement by scheduling additional settlement discussions.

IV. CONCLUSION

Documenting judicial settlement attitudes and practices are important because assisting settlement has become a significant aspect of judging and it is done off the record. Gaining access to judges' perspectives is important, not because it is without bias, but because the other empirical data (usually from attorneys) is equally biased. Including the judges' biased perspective creates a more comprehensive picture.

There are legitimate concerns about judges facilitating settlement, especially when they are doing so for cases assigned to them for trial. The concerns are amplified if the case will be decided by the judge in a bench trial. The data reveals that most judges are not being discouraged from attempting to settle cases assigned to them for trial. Some have no systemic

alternative; the result is that most judges actively participate in assisting settlement, for many including the cases assigned to them for trial.

This article reveals that many of the nitty-gritty questions about judicial settlement techniques and ethics are being largely resolved on an individual basis. These issues can be clarified by case law when parties ask for appellate review of the behavior of settlement judges. The question is whether there should be uniformity in some of the practices reported in this article. Should judges be required to make a finding of essential/approximate fairness or unconscionability when they supervise a settlement? If not, should judges be required to clearly explain their function as a neutral facilitator when they are assisting with settlement?

Although most settlement judges report being less directive when serving as the trial judge, a significant minority report being more directive. Should this variation in these practices be accepted as a matter of personal preference and professional deference to judges? This article documents the extent and frequency of diverse practices. The data begs many questions for the best practices by individual judges and institutions providing advisory and mandatory guidance for judges.